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No. 89-333

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PACIFIC NORTHWEST UTILITIES AMICUS BRIEF

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PACIFIC NORTHWEST UTILITIES AMICUS BRIEF

INTEREST OF THESE AMICI

This brief is filed on behalf of 9 Pacific Northwest utilities, 7 of which are members of the Public Generating Pool. The Pool, its members, and the other individual utilities are described in Appendix A. All of them are parties to the Pacific Northwest Coordination Agreement (described below at pp. 18-24) and all will be directly affected by the procedures and standards which will govern their future applications for hydroelectric power project licenses and license renewals. They submit this amicus brief in support of the proposition that the hydroelectric power licensing process has been functioning, and should continue to function, in the way in which Congress intended.

SUMMARY OF ARGUMENT

The premise and the conclusion of this brief is that Congress intended, and for good reason, that final authority for determining the conditions of hydroelectric project licenses be vested in the Federal Energy Regulatory Commission ("FERC"). Congress did not intend to give the states veto power over license conditions which FERC has determined to be in the public interest.

The Pacific Northwest provides excellent examples of the importance of coordination in the operation of hydroelectric projects and of the complexity of the process of attaining that coordination. Many different, and often conflicting, interests must be taken into account. Individual Pacific Northwest project licenses illustrate the accommodation of interests as diverse as flood control and navigation, the needs of

nuclear installations, fish and wildlife protection (from both federal and state perspectives), archaeological survey and salvage, recreation, the rights of Indian tribes, the jurisdictional concerns of states and local governments, and federal rights and obligations under the Columbia River Treaty with Canada. Those illustrative licenses make it clear that regulatory constraints unilaterally imposed by individual states would have impacts far beyond the borders of those states.

The Pacific Northwest Coordination Agreement provides mechanisms for coordinating the operation of the entire system within the constraints created to accommodate those many competing interests. As a result, it provides billions of dollars in benefits to the citizens of the Pacific Northwest and California. Individual states are required by their own laws to administer their water resources for the benefit of their own

citizens. The coordinated system could not operate with its present effectiveness if it were hampered by unilaterally-imposed license conditions designed to benefit the local interests of individual states.

Congress never intended that the licensing process be subjected to that kind of strain. Congress provided in the Federal Power Act a comprehensive regulatory scheme in which competing interests are balanced and accommodated under FERC's authority. When it recently amended the Federal Power Act in the Electric Consumers Protection Act of 1986, Congress provided an enlarged role for the states by institutionalizing the role of recommendations made by state regulatory agencies. However, it chose not to disturb the provisions of the Federal Power Act which this Court and others have long interpreted to mean that the states do not have independent power to impose project

license conditions based on regulatory laws.

Federal law provides for meaningful state participation in decisions about hydroelectric power. However, Congress never intended that the final decisions about project licenses be in the hands of the states. Rather, it has assigned to FERC both the responsibility to carry out federal policies and the ultimate authority which is necessary to meet that responsibility.

ARGUMENT

1. The Pacific Northwest Hydroelectric System Is a Complex and Coordinated System.

In the Pacific Northwest more than 100 hydroelectric projects are operated as a coordinated system. For that coordinated system to function effectively it is vital that license conditions for

individual projects be determined at the federal level after all affected interests -- those of the states, the federal government, Canada, and various Indian tribes -- are taken into account. Because the system impacts many different entities with many different interests, there is often conflict over issues such as flood control, irrigation, recreation water levels, power production, international and Indian treaty rights and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. Those widely disparate interests could not be properly balanced if individual states could dictate conditions like minimum flow requirements for individual projects.

Some examples will illustrate the interrelated nature of the problems which must be addressed during the licensing process.

One excellent example of the importance of coordination under unified authority, because of the many competing interests which had to be accommodated at a single project, is provided by Wells Dam, FERC License No. 2149, issued to Douglas County Public Utility District in 1962.[1]

Wells is one of 11 dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam, located in the state of Washington at river mile 515.8, is 1,120 feet wide, has a reservoir 29.5 miles long, and has 10 generators rated at a total of 820 Mws. The dam and reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and

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[1]Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.

private lands under the jurisdiction of various municipalities and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are the remaining mid-Columbia dams licensed to members of the Public Generating Pool. Further downstream the Columbia River becomes the boundary between Washington and Oregon where it is spanned by several federally-owned projects. All these dams and reservoirs are coordinated by hydroregulation under the Pacific Northwest Coordination Agreement.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, if necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game, among others, participated before FERC in developing the details of that requirement. The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires Douglas County Public Utility District to reimburse the Corps if that encroachment should interfere with power production at Chief Joseph.

The license addresses many competing interests. Those interests include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife, archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries

interests of the State of Washington, the license addresses the interests of other states in anadromous fish,[2] tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

The license also prescribes, for flood control, how the dam will be operated in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty (described below at pp. 19-20) for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The history of Priest Rapids Dam provides another example of the importance of FERC's authority. The license for

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[2]Salmon and steelhead trout are anadromous fish. In Pacific Northwest rivers they migrate downstream to the Pacific Ocean where they remain two to four years before returning upstream to spawn in the streams where they were hatched.

Priest Rapids, issued in 1955 to the Grant County Public Utility District, provided for minimum flows of 36,000 cubic feet per second (cfs), which had to be coordinated with releases from upstream publicly-owned federal dams (Grand Coulee and Chief Joseph) as well as other upstream mid-Columbia dams such as Wells, Rocky Reach, Rock Island, and Wanapum. When it determined the minimum flows for Priest Rapids, FERC had to balance, along with all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford nuclear projects at the Hanford Nuclear Reservation immediately downstream.

At Vernita Bar, downstream from Priest Rapids, salmon redds (nests of eggs) were harmed in 1976 during fluctuating flows. The affected state fisheries agencies originally received compensatory fish production from the nuclear project

owners; later they petitioned FERC to amend the Priest Rapids license to increase the minimum flows to 70,000 cfs. With the help of FERC Administrative Law Judges, Grant County Public Utility District and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Recently the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement. The agreement creates a sliding scale of minimum flows based on how much spawning occurs at various water levels.[3] The ability of Priest Rapids to meet its

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[3]Automatically giving preference to the highest locally-recommended flow requirement (see Brief of Amici Curiae American Rivers et al.) could devastate fish populations elsewhere. Spawning occurs at the edge of a stream in the shallows. The eggs could be exposed and destroyed if the water level was too high during spawning because of high minimum-flow requirements and was later lowered by drought or other conditions.

minimum flow requirements without severe and imprudent reservoir drafts (which would adversely affect power production or recreational facilities) depends on releases from the federal storage projects upstream from Priest Rapids. BPA is a party to this settlement and has agreed to provide releases from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. In addition, the Chelan County and Douglas County Public Utility Districts provide compensated reservoir draft at their projects to assist Priest Rapids.

The parties involved in this settlement, approved by FERC and conducted under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,[4] the

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[4]Salmon and steelhead trout may be caught in the Pacific Ocean where they mature before returning to spawn. See footnote 2, supra.

Oregon Department of Fish and Wildlife,[5] BPA, the Chelan, Douglas and Grant Public Utility Districts, and three sovereign Indian Tribes[6] which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

The importance of ultimate federal authority is also illustrated by the situation of Washington Water Power Company ("WWP"). WWP serves its customers, most of whom are in Idaho and Washington, with power generated in large part by projects located in Washington, Idaho and Montana. Two projects -- Noxon Rapids and Cabinet Gorge -- provide the majority of WWP's peak generating capacity. Both are located on the Clark Fork River which flows from Montana into Idaho. The Noxon Rapids Project is located in Montana. Cabinet Gorge straddles the Idaho-Montana

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[5]Many of these fish are spawned and caught on the Oregon side of the Columbia River.

[6]The Yakima, Umatilla and Colville tribes.

border.[7] WWP serves less than 20 retail customers in Montana, most of whom are company employees who work at the dam sites.

In this setting it is clear that a regulatory constraint imposed by the State of Montana could significantly impact most of WWP's retail electric customers who reside in other states. Those impacts would be felt in the states of Idaho, Washington, and Oregon. They would also be felt in Canada.[8]

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[7]Ninety-nine percent of the reservoir is in Montana, while the dam and powerhouse are in Idaho.

[8]From the Noxon Rapids Project in Montana, the Clark Fork River flows to the Cabinet Gorge Project which straddles the Idaho/Montana border. From there, the Clark Fork River flows into Lake Pend Orielle. The outflow of Lake Pend Orielle is the Pend Orielle River, which flows through the Albeni Falls Project, operated by the U.S. Corps of Engineers in Idaho. From Albeni Falls the Pend Orielle River flows into the State of Washington and through the Box Canyon Hydroelectric Project, owned and operated by the Public Utility District No. 1 of Pend Orielle County, Washington, and then through the Boundary Hydroelectric Project owned and

The importance of ultimate federal authority, and the impracticability of granting individual states a veto power over the conditions of individual project licenses, is graphically illustrated in the Noxon Rapids and Cabinet Gorge settings. Montana might well determine that its interests would best be served by requiring high minimum flows from those projects in the summertime in order to reserve extra capacity for wintertime flood control. Downstream, however, the state of Idaho might conclude that it should require high minimum flows in the spring and fall for fish passage, and the state of Washington might decide to require high minimum flows

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(Footnote 8 cont.) operated by the City of Seattle, Washington. The river then flows into the province of British Columbia where it passes through the Seven Mile and Waneta Hydroelectric Protects. In Canada, the river flows into the Columbia River. The Columbia River flows from its confluence with the Pend Orielle River into the State of Washington. There are eleven downstream hydroelectric projects with various federal and non-federal ownerships on the Columbia River.

in the winter to accommodate peaking needs for electric power. If each of those states could prevent the issuance or renewal of a license unless its unilaterally-determined and inconsistent conditions were met, the likely result would be impasse. FERC, exercising a unified licensing authority, can balance and accommodate competing interests and can resolve potential conflicts of that kind.

2. The Pacific Northwest Coordination Agreement: The Conditions of a Single Pacific Northwest Hydroelectric License Can Affect More Than 100 Facilities.

A central feature of the Federal Power Act is Congress's commitment to coordinated study and comprehensive planning along an entire river system as a part of the hydroelectric licensing process. National Wildlife Federation v. F.E.R.C., 801 F.2d 1505, 1507 (9th Cir.

1986). In the Pacific Northwest, as shown above, an "entire river system" often spans several states and may be partially in Canada.

Since the early 1960's, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated in a way that provides substantial benefits to the public in the Pacific Northwest states and in Canada. The parties to the Pacific Northwest Coordination Agreement include 15 public and investor-owned utilities that own and operate hydroelectric facilities as well as the Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over a hundred hydroelectric plants, including 21 projects owned and operated by the United States government. Many of these projects are on the Columbia River and its tributaries; the rest are located

throughout the Pacific Northwest. Because the Bonneville Power Administration is a member of the coordinated system, any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.[9] Pursuant to that treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

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[9]"Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest while taking into account non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The coordination of minimum flows for fish passage is part of that regulation. The benefits of coordination are equitably

distributed through a complex contractual arrangement. The coordination is implemented by daily adjustment and fine-tuning as made necessary by the many variables, including especially the weather, which can affect the ongoing operation of the system.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements. For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet. The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus in the Pacific Northwest, unlike many other areas of the country, the benefits of a large portion of the annual runoff must be captured within a short time or be lost

forever. Taking such constraints into account, the coordinated system achieves a delicate balance among utility load requirements, reservoir storage capacity, and streamflow needs.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, such things as minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around the turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

The result is a regional system which is coordinated electrically,

hydraulically, contractually and economically. Its electrical integration is accomplished through multiple transmission system interconnection. Its hydraulic integration is accomplished despite diverse ownership of multiple projects on various river systems. The Coordination Agreement and other operating agreements provide system efficiency as well as economic and other benefits. Benefits include the ability to adjust flows through turbines to meet changes in load, the ability to draft reservoirs to allow for refill and flood control in the spring, and the ability to provide storage to meet power needs in the summer and during low flow conditions.

Minimum flow requirements, which reduce the system's flexibility, can have a substantial impact on the ability of the system as a whole to optimize power production. Such requirements affect not only the individual project upon which they

are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across state and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow requirements based on legally-mandated local self-interest (see pp. 27-28, below), the result would be the disruption of the economic viability of projects hundreds of miles downstream. It could even include destruction of an ocean fishery.

3. The Federal Hydroelectric Regulatory System Is Operating as Congress Intended.

Congress, in the exercise of its power over interstate commerce, has authorized FERC to regulate through its licensing procedures the construction and operation of hydroelectric projects on navigable waters, U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940), reh. den. 312

U.S. 712 (1941), pet. den. 317 U.S. 594 (1942), or otherwise affecting interstate commerce. F.P.C. v. Union Electric Co., 381 U.S. 90, reh. den. 381 U.S. 956 (1965). 16 U.S.C. § 797(3). Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, extends the power of the Federal Power Commission (now FERC) over hydroelectric projects to the full extent permitted under the Commerce Clause. 381 U.S. at 105.

The Federal Power Act is a comprehensive scheme of regulation which requires FERC to balance multiple interests, including those of the state and federal governments. Section 10(a) of the FPA requires that FERC consider not only hydropower but also other beneficial uses in its determination of the public interest. This Court has emphasized that requirement:

> "The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues

> relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."

Udall v. Federal Power Comm'n., 387 U.S. 428, 450 (1967).

That FERC actually does take all the required interests and areas into account is evident from the examples discussed above at pp. 7-14. In its licensing proceedings FERC not only considers a wide variety of issues, but considers these issues from the perspectives of many parties.

The breadth of FERC's Congressionally-mandated concern with the public interest contrasts markedly with the interests of individual states which necessarily are more localized and parochial. For example, the Water

Resources Code of the State of Washington provides:

> "It is the purpose of this chapter to set forth fundamentals of water resource policy for the state to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington." Wash. Rev. Code § 90.54.010 (emphasis added)

> "Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state." Wash. Rev. Code § 90.54.020(2) (emphasis added)

The Montana Water Use Code embodies that state's policy to

> ". . . provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people . . ." Mont. Code Ann. § 85-2-101(3) (emphasis added)

Similarly, Oregon's water resources policy is to be guided by a legislative finding that:

> "The maintenance of the present level of the economic and general welfare of the people of the state and development of this state for the increased economic

> and general welfare of the people thereof are in large part dependent upon a proper utilization and control of the water resources of this state . . ." Or. Rev. Stat. § 536.220(1) (emphasis added)

FERC properly takes the states' local interests seriously in its licensing proceedings (see pp., 7-14, above). However, Congress did not intend that local or parochial interests be the basis for giving individual states a veto power over hydroelectric projects which FERC has determined are in the interest of all the public.[10] If Congress had so intended, it would have made that intent clear. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 178-79 (1946).

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[10]The states would certainly not have that power without Congressional authority. The Commerce Clause precludes a state from mandating for its residents a preferred right of access to natural resources located within its borders. New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982). Moreover, in navigable waters the pre-eminent authority to regulate the flow resides with the federal government. Id. at note 6.

Instead of evidencing such an intent, Congress in the FPA created detailed provisions which "leave no room or need for conflicting state controls." 328 U.S. at 181.[11]

The states themselves have recognized that the ultimate authority rests with the responsible federal agency, not with individual states. For example, the Washington Supreme Court has recognized that in the FPA Congress has

> ". . . preempted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper."

Tacoma v. Taxpayers, 43 Wash.2d 468, 489, 262 P.2d 214 (1953). It was the

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[11]In recent decisions construing other statutes, this Court has held that parochial state interests cannot disrupt what Congress intended to be a comprehensive federal regulation of interstate commerce. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 108 S.Ct. 1145 (1988); City of New York v. F.C.C., 486 U.S. 57, 108 S.Ct. 1637 (1988).

Commission, the court held, not any state agency

> ". . . which under our constitutional government must pass upon the measures necessary for the protection anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States."

43 Wash.2d at 493. The Oregon Supreme Court, when faced with the question whether the state has the power to veto a federal license for a hydroelectric project on a navigable stream, concluded that neither Section 9(b) nor Section 27 of the FPA granted such a right. State v. Idaho Power Co., 211 Or. 284, 291, 312 P.2d 583 (1957).

Recent Congressional action documents a clear intent that FERC, not the states, is responsible for and has final authority for performing the licensing function. The Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495 (October 16, 1986) added Section 10(j) to the Federal Power Act.

That new provision requires that each license issued by FERC include conditions for protection and enhancement of fish and wildlife. 16 U.S.C. § 803(j). Those conditions shall be based on recommendations of the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies unless FERC specifically finds that those recommendations are inconsistent with the governing law. 16 U.S.C. § 803(j)(2). It is clear from the legislative history that Congress, by adding that requirement to the Federal Power Act, did not intend to grant the states a "veto over a project," but rather to require "heavy reliance and acceptance by FERC, except in limited circumstances," of agency recommendations. H.R. Rep. No. 99-507, 99th Cong., 2d Sess. p. 22 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2496, 2509. Although Section 10(j) "upgrades statutorily the

importance and status of fish and wildlife recommendations," they nevertheless remain "'recommendations,' not mandatory requirements." H.R. Rep. No. 99-934, 99th Cong., 2d Sess. p. 25 (1986), reproduced at 1986 U.S. Code Cong. and Adm. News 2537, 2541. Under new section 10(j), FERC remains empowered to decide license terms and conditions (id. p. 23, reproduced at p. 2540).

In 1946 this Court, in First Iowa, concluded that Section 27 of the FPA had primary, if not exclusive, reference to the states' traditional authority over the allocation of proprietary water rights. 328 U.S. at 175-76. In 1986 Congress enacted ECPA, which includes many amendments to the FPA. Nevertheless, Congress chose not to make any changes in Section 27 as construed by this court in First Iowa. Moreover, in spite of the intervening decision in California v. United States, 438 U.S. 645 (1978), upon

which Petitioner relies, it is clear from the statute itself and from the legislative history that when it enacted ECPA Congress did not intend that the states have a veto power over federally-licensed projects through their regulatory laws designed to protect local interests. No statutory "upgrading" would have been necessary if the states could have imposed minimum flow conditions under the limited authority reserved to them by Section 27. This Court should give effect to Congress's clear intent to preserve the long-standing construction of Section 27 of the FPA. Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596-97 (1980); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

Both before and after the enactment of ECPA, the states have participated in decisions about hydroelectric power by allocating priorities to water rights within their jurisdictions and by advancing and

advocating localized interests in the FERC licensing process. The issue in this case is not whether those interests will be protected. FERC is required to, and does, take them into account in the Congressionally-mandated balancing process. But the ultimate balance must be struck at the federal level, as provided in the FPA, without threat of additional conditions which a state might unilaterally impose based on purely local state interests. A system of dual authority would allow individual states to defeat Congressional purposes and federal policies. That is not what Congress intended.

CONCLUSION

Congress has always intended that FERC have the final authority to determine the conditions to be imposed upon the operation of hydroelectric facilities which affect interstate commerce. The Pacific

Northwest's highly-integrated system of hydroelectric power production shows how the federal regulatory system, as prescribed by Congress, works. The states' local interests are protected because FERC is required to take them into account. Congress never intended that those local interests be protected by the exercise of a local veto power through the imposition of operating conditions which FERC has not found to be in the public interest.

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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By _____
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Appendix A

I. The Public Generating Pool and Its Members.

The Public Generating Pool is a group of seven publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light); the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD, Grant County PUD; and the Eugene Water & Electric Board (EWEB).

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mws. Some of these facilities are described in detail below.

These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the Bonneville Power Administration (BPA). As signatories to the Pacific Northwest

Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

A. Seattle City Light.

Seattle City Light owns four hydroelectric projects: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. These projects have a total nameplate rating of 1200 Mws annually. Seattle also purchases from five other hydroelectric projects.

Seattle also has a FERC license for its project on the South Fork of the Tolt River, License No. 2459, which has been stayed pending a comprehensive, cumulative assessment of appropriate minimum flows in light of all Snohomish River Basin applications. The stay was requested by the Washington Departments of Fisheries and

Game[1], the Tulalip Tribes, the National Marine Fisheries Service and the United States Department of Interior; the positions of those entities will be considered before FERC finally determines the license conditions.

The Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

B. Tacoma City Light.

Tacoma City Light has three federally-licensed hydroelectric projects

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[1]The former Washington Department of Game is now the Washington Department of Wildlife

which have a total rating of approximately 700 Mws. It also purchases from other hydroelectric facilities. Tacoma's projects involve rivers with high spring runoffs when compared to reservoir storage capacity. FERC, in these licenses in particular, has had to balance federal Army Corps of Engineers flood control concerns with State of Washington instream flow recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD.

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mws, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and non-federally owned dams on the Columbia

River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD.

Cowlitz County PUD holds the license for the Swift Project, #2, License No. 2213, on the Lewis River. The project has a rating of 70 Mws and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD.

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mws. The Wells license is described at pages 7-10 of the brief.

F. Grant County PUD.

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mws, respectively. Grant also purchases from several small hydroelectric projects. The history of the Priest Rapids license is described at pp. 10-14 of the brief.

G. Eugene Water & Electric Board.

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mws. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal License No. 2496 at Leaburg Dam which was done and approved by FERC.

II. The Washington Water Power Company.

The Washington Water Power Company was incorporated in 1889 in the Territory of Washington, and has its principal offices in Spokane, Washington. The company service area has an estimated population of 700,000. Over 60 percent of WWP's peak generating capacity is furnished by nine hydroelectric generating stations located in the states of Washington, Idaho and Montana. WWP also purchases from other utilities, under long-term contracts, power generated by other hydroelectric facilities. Its situation is described in more detail at pp. 14-15 of the brief.

III. Montana Power Company.

The Montana Power Company is a combination electric and natural gas utility organized and authorized to conduct its business under the laws of Montana. A substantial portion of Montana Power's electric generating resource, which serves more than 245,000 electric customers, is

hydroelectric generation. Montana Power currently owns and operates fourteen dams, all licensed by FERC.